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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 79

AMERICAN AIRLINES, INC.,

Petitioner,

v.

JOSEPH V. MANNING, as President of the AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

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OCTOBER TERM, 1963

No. .....

AMERICAN AIRLINES, INC.,

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v.

JOSEPH V. MANNING, as President of the AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

American Airlines, Inc. petitions for a writ of certiorari to review a judgment in the above entitled case by the United States Court of Appeals for the Second Circuit.

Opinions Below.

The opinion of the Court of Appeals is reported as *Manning* v. *American Airlines, Inc.*, 329 F. 2d 32 (2 Cir.

1964), and is set forth in the Appendix hereof at 1c to 6c. The opinion of the United States District Court for the Southern District of New York is reported in 221 F. Supp. 301, and is set forth in the Record, Part One, at 5a through 19a.*

Jurisdiction.

The judgment of the Court of Appeals was entered on February 14, 1964 (App. 6c). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented.

1. Whether the federal courts have jurisdiction to, or should, grant an injunction to a union in a dispute involving rights claimed by a carrier under a dues check-off agreement entered into pursuant to the Railway Labor Act (i) when the union has failed to submit the dispute to the Adjustment Board for arbitration and has otherwise failed to use "best efforts" to settle it, and (ii) when there is no irreparable injury requiring ancillary equitable relief.

2. Whether the Railway Labor Act requires that a dues check-off arrangement be continued beyond the fixed date on which the parties had agreed that it would be discontinued.

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* The Record Appendix is cited hereinafter as "R". It is divided into two parts: The pages in Part One are numbered with the suffix "a", and the pages in Part Two are numbered with the suffix "b". The pages in the Appendix to this petition are cited "App." and numbered with the suffix "c".

Statutes Involved.

The statutes involved are the Railway Labor Act and the Norris-LaGuardia Act, and the provisions relied upon are set forth in the Appendix (App. 9c-17c). For convenient reference, these provisions are summarized below.

Section 201 of the Railway Labor Act makes that Act applicable to air carriers (45 U. S. C. §181), and Section 2 First requires unions and employers "to exert every reasonable effort" both to "make and maintain agreements" (45 U. S. C. §152 First).

Section 6 of the Railway Labor Act provides for the giving of notices of intended change in agreements and requires that, until the statutory procedures have been completed, "rates of pay, rules, and working conditions" are to be maintained (45 U. S. C. §156). Section 2 Seventh contains a similar provision for the period while agreements are in effect (45 U. S. C. §152 Seventh). Section 204 requires carriers and unions to establish Adjustment Boards having jurisdiction over grievances and disputes involving interpretation or application of agreements (45 U. S. C. §184). Section 2 Fourth and Tenth make it a crime for a carrier to deduct dues payable to a union, but Section 2 Eleventh, added in 1951, permits such deductions if made pursuant to an "agreement" (45 U. S. C. §152).

Section 7 of the Norris-LaGuardia Act deprives federal courts of jurisdiction to issue injunctions in labor disputes without finding *inter alia* "(b) that substantial and irreparable injury to complainant's property will follow . . . [and] (d) that complainant has no adequate remedy at law" (29 U. S. C. §107). Section 8 prohibits the granting

of an injunction to "any complainant" who failed to make every reasonable effort to settle the dispute "either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration" (29 U. S. C. §108).

Statement of the Case.

American Airlines, Inc., an air carrier, entered into certain agreements, in 1958, with the AAL Chapter, Flight Engineers' International Association (hereinafter called the "flight engineers"). One such agreement was the "basic agreement"; another was the "dues check-off agreement".

The basic agreement covers the rates of pay, rules and working conditions for flight engineers. The dues check-off agreement is a specialized "side agreement" devoted exclusively to the check-off of union dues.

This was the first dues check-off arrangement between American and its flight engineers. The issue had been hotly contested in negotiations; finally the parties were able to strike a compromise which "split it down the middle": they agreed that the dues check-off agreement would be for a limited term, and that the check-off of dues would be discontinued on the expiration date fixed by that agreement. They did this knowing that negotiations, instituted by service of a Section 6 notice in respect to renewal of the basic agreement, would likely extend beyond that date. And to express the compromise reached, the parties particularly selected, for the terminal clause of the side agreement, special language quite different from the terminal language customarily used in their basic agreement.

> "G. This Agreement shall become effective May 1, 1958 and shall continue in full force and effect until April 30, 1963, and shall be subject to renewal

thereafter *only by mutual agreement of the parties hereto.*"* (Emphasis added.)

That the parties intended that the dues check-off would end on April 30, 1963, is not contested, as shown by the following stipulations in the District Court (R. 20a-21a):

> "Mr. Wisehart [Counsel for Petitioner]: That's right, and that is the next question. I do not understand Mr. Schwartz to seriously dispute what the agreement on its face calls for. Assuming that it does call for termination on April 30, * * *
>
> The Court: It seems to me at this point reasonably plain that that is what the agreement calls for. I don't see that an agreement of that nature needs any interpretation. It is either there or it isn't there. Do you agree, Mr. Schwartz?
>
> Mr. Schwartz [Counsel for Respondents]: I do, your Honor.
>
> * * * * * * *
>
> Mr. Schwartz: Yes. We have stated, and we have stated before Judge Bryan and your Honor, that there is no question between us as to what the agreement means. Judge Bryan said it is clear, we said it is clear it terminated. The agreement was that there be an end, period * * *."

However, before the expiration date, the flight engineers served a Section 6 notice and now assert that by that unilateral act the check-off arrangement, which the parties, by their special agreement, had understood was to be dis-

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* In contrast, the duration clause of the basic agreement provides (R. 8a): "This Agreement shall become effective May 1, 1958 and shall continue in full force and effect until April 30, 1963 and shall renew itself without change until each successive April 30 thereafter unless written notice of intended change is served in accordance with Section 6, Title I, of the Railway Labor Act, as amended, by either party hereto at least sixty (60) days prior to April 30 in any year after April 30, 1962: . . ."

continued on April 30, 1963, must be continued indefinitely beyond that date.*

The flight engineers then sued for a mandatory injunction to require continuation of the dues check-off. The suit was brought in the United States District Court for the Southern District of New York, the jurisdiction of which was invoked because the case arises under the Railway Labor Act an "Act of Congress regulating commerce" (28 U. S. C. §§1337, 2201, 2202).

Neither before nor after commencing the suit did the flight engineers make an attempt to seek a remedy from the Adjustment Board or the National Mediation Board (R. 20a, 22a-23a).

An injunction was entered by the District Court on September 16, 1963 (App. 7c-8c). The District Court held that this is a "major" dispute, that there is no question of contract interpretation, that the flight engineers had no obligation to invoke the services of the National Mediation Board or the jurisdiction of the Adjustment Board, and that the parties' agreement to terminate the dues check-off on April 30, 1963 was contrary to public policy (R. 13a, 17a). The Second Circuit affirmed (App. 6c-7c). It found that dues check-off constitutes a "working condition" under Section 6 of the Railway Labor Act, and that the Adjustment Board had no jurisdiction (App. 3c-6c). The Second Circuit concluded that the purpose of Section 6 ". . . is to stab-

* Experience under the Railway Labor Act has shown that the statutory procedures, during which the "status quo" must be maintained, may continue for many months, frequently years. In this case, for example, it is already apparent that the "status quo" period will substantially exceed one year. Because of such lengthy periods, it is obviously important for those covered by the Act to know whether it lies within their competence to agree that certain specialized arrangements will terminate on a fixed date mutually agreed to, rather than being subject to indefinite continuation through unilateral action.

ilize relations by *artificially* extending the lives of agreements for a limited period regardless of the parties' intentions." (App. 4c; emphasis added.)

Reasons for Granting the Writ.

I.

The Second Circuit concluded that the Adjustment Board has no jurisdiction because application of Section 6 of the Railway Labor Act is involved (App. 6c). This conclusion is in direct conflict with decisions in other circuits, and inconsistent with decisions of this Court.

In *St. Louis, San Francisco & Texas R.* v. *Railroad Yardmasters of America*, 328 F. 2d 749 (5 Cir. Mar. 4, 1964), a railroad abolished certain jobs. The union sought an injunction, as here, alleging violation of Section 6 (45 U. S. C. §156). The railroad contended that there was no violation because its action was based on rights under a contract. The Court of Appeals held that the Adjustment Board had exclusive jurisdiction, and reversed the District Court's injunction. In the Fifth Circuit's view, the contractual defense gave rise to an issue required to be determined by the Adjustment Board, notwithstanding the Section 6 allegation.

See also *Machinists* v. *Eastern Air Lines, Inc.*, 320 F. 2d 451 at 453 (5 Cir. 1963).

Aaxico Airlines, Inc. v. *Air Lines Pilots Association*, ... F. 2d ....., 49 CCH L. C. ¶18,886 (5 Cir. Apr. 15, 1964), holds that a dispute as to whether or not an agreement has terminated is a "minor" dispute and within the exclusive jurisdiction of the Adjustment Board.

While the Second Circuit says that this case does not involve contract interpretation, the following passage from the opinion shows that its decision in fact rests on an interpretation of the check-off agreement (App. 4c):

> "A stronger form of the argument is that the contrast of the language of the check-off agreement—

> 'shall be subject to renewal thereafter only by mutual agreement of the parties hereto'—with the automatic renewal language of the basic agreement, and of two side agreements, warrants the conclusion that the parties did not mean §6 to apply. Passing the question whether and how parties subject to the Railway Labor Act can lawfully make agreements 'affecting rates of pay, rules or working conditions' so that these will not be subject to §6, as might be convenient when unusual situations of short duration arise within the period of a basic contract, *we think the argument puts more strain on the words of the check-off agreement than these will bear. In our view the different language meant only that automatic renewal of the basic agreement would not carry the check-off agreement along with it.* It is no answer that §6 thus gives identical effect to two intentionally dissimilar provisions; the very purpose of §6 is to stabilize relations by artificially extending the lives of agreements for a limited period regardless of the parties' intentions." (Emphasis added.)

What the contract's "different language meant", and whether "the argument puts more strain on the words of the check-off agreement than these will bear", are questions which have been entrusted to the Adjustment Board. Congress has asked for the "view" of the Adjustment Board, not the "view" of the Court of Appeals, concerning such matters.

The Adjustment Board has exclusive jurisdiction because of its expertise, and because it alone can provide a uniform interpretation of the agreements between the parties, not to speak of the therapeutic values inherent in the process. Lack of uniformity in the disposition of such matters ". . . would hamper if not defeat the central purpose of the Railway Labor Act." *Pennsylvania R.* v. *Day*, 360 U. S. 548 at 553 (1959). While the jurisdiction of federal courts is subject to geographical limitations, the Adjustment Board may make a determination that is

"final and binding" throughout the American Airlines system.

The danger of inconsistent determinations by various Courts of Appeals, if not already obvious, is brought home by *Flight Engineers' International Association* v. *American Airlines, Inc.*, 303 F. 2d 5 (5 Cir. 1962). That case involved the duration clause of the same basic agreement between the very same parties (although the dues check-off agreement was not in issue). There, the Fifth Circuit held that the *Adjustment Board* should make the kind of determinations about duration clauses which the Second Circuit itself has made here (303 F. 2d at 13).

In *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561 (1946), an injunction was denied, despite an asserted violation of Section 6, because there had been no prior resort to the Adjustment Board. There, as here, the carrier's defense was based on a collective bargaining agreement. In *Manion* v. *Kansas City Terminal R.*, 353 U. S. 927 (1959), an injunction against a union was denied *per curiam*, again because of no prior resort to the Adjustment Board by the plaintiff.

Relying on *Manion, supra*, the Seventh and Eighth Circuits have held that injunctions should be denied—whether sought by the union or the carrier—when there had been no prior resort to the Adjustment Board. *Hilbert* v. *Pennsylvania R.*, 290 F. 2d 881 at 885-886 (7 Cir. 1961), certiorari denied, 368 U. S. 900; *Machinists* v. *Northwest Airlines, Inc.*, 304 F. 2d. 206 at 212 (8 Cir. 1962).*

The Adjustment Board is a form of compulsory labor arbitration. *Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682 (1963); *Trainmen* v. *Chicago River & Indiana R. Co.*,

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* Those cases were held to involve "minor" disputes. Under the test in *Elgin, Joliet & Eastern R.* v. *Burley*, 325 U. S. 711 at 739 (1945), American's claims with respect to the duration clause have to do with "accrued rights", and also constitute a "minor" dispute. See *St. Louis, San Francisco & Texas R.* v. *Railroad Yardmasters of America*, 328 F. 2d 749 (5 Cir. Mar. 4, 1964); *Aaxico Airlines, Inc.* v. *Air Line Pilots Association*, F. 2d , 49 CCH L. C. ¶18,886 (5 Cir. Apr. 15, 1964).

353 U. S. 30 at 39 (1957). Its jurisdiction is exclusive. *Slocum* v. *Delaware, Lackawanna & Western R.*, 339 U. S. 239 (1950); *Pennsylvania R.* v. *Day*, 360 U. S. 548 at 552-554 (1959). ". . . when Congress ordered the establishment of system boards to hear and decide airline contract disputes, it intended the [Adjustment] Board to be and act as a public agency, not as a private go-between". *Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682 at 695 (1963), quoting with approval from *Bower* v. *Eastern Air Lines, Inc.*, 214 F. 2d 623 at 626 (3 Cir. 1954), certiorari denied, 348 U. S. 871. ". . . if a carrier or a union could choose a court instead of the Board," the other party would be "deprived of the privilege of" an Adjustment Board determination. *Order of Railway Conductors* v. *Southern Railway*, 339 U. S. 255 at 256 (1950). Therefore, one party "may not defeat this right by resorting to some other forum." *Locomotive Engineers* v. *Louisville & Nashville R.*, 373 U. S. 33 at 38 (1963).

We submit that the exclusive nature of the Adjustment Board's jurisdiction has been declared too emphatically for a dubious exception to be created here without review by this Court.*

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* Adjustment Board agreements pursuant to Section 204 of the Railway Labor Act have been equated to labor arbitration under Section 301 for the purposes of federal jurisdiction. *Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682 at 692 (1963). Two cases just decided indicate that exceptions to the duty to arbitrate are to be narrowly construed. *John Wiley & Sons, Inc.* v. *Livingston*, U. S. , 84 S. Ct. 909 (Mar. 30, 1964); *Local Union No. 271, United Packinghouse, Food and Allied Workers* v. *Needham Packing Co.*, U. S. , 84 S. Ct. 773 (Mar. 9, 1964). The exceptions to the duty to arbitrate are narrow because of arbitration's therapeutic values, not only in interpreting agreements, but also "when it comes to formulating remedies." *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 at 597 (1960). See also *Drake Bakeries* v. *Bakery Workers*, 370 U. S. 254 at 266 (1962). Remedies in the form of injunctions in labor disputes have not had similar therapeutic values attributed to them, however. See *Frankfurter & Greene, The Labor Injunction* (1930). The lack of therapeutic values is particularly evident when, as in this case, the injunction serves to foreclose action by the specialized agencies which have been created to deal with the matter.

II.

On the merits, this is a case of first impression having an important bearing on the administration of the Railway Labor Act. The Act contains peace-making procedures during which resort to "self-help", or economic warfare, is deferred. Cf. *Elgin, Joliet & Eastern R.* v. *Burley*, 325 U. S. 711 at 725 (1945); *Locomotive Engineers* v. *Baltimore & Ohio R.*, 372 U. S. 691 (1963). Implicit in the decision below is the assumption that termination of the dues check-off was the equivalent of some form of self-help, such as a strike, lock out, or other unilateral change in conditions. But whether action taken pursuant to *mutual agreement* can be equated to such unilateral *self*-help is by no means clear.

If the parties had held their first negotiating session on April 30, 1963 and, to meet the exigencies then existing, had agreed to terminate the dues check-off temporarily, while negotiations continued, that agreement surely would be given effect, whether or not a Section 6 notice was outstanding. No violation of the "status quo" would be involved: the action taken would result not from unilateral change, but from *bilateral agreement*.

The only difference between the foregoing example and this case is that the agreement to terminate the dues check-off was not made in *current* negotiations, but in the *preceding* negotiations—to meet the exigencies existing when the dues check-off arrangement was first adopted. Should this agreement not be given effect as well? In each case, termination of the dues check-off results from bilateral agreement, not unilateral change. The only distinction is in point of time: in the first example, termination was agreed upon in current negotiations; in this case, termina-

tion was agreed upon in the preceding negotiations. We suggest that voluntary consensual arrangements arising out of the exigencies of either situation should be given effect.

The requirement that carriers and unions "exert every reasonable effort to *make and maintain* agreements" is the first duty imposed by the Railway Labor Act (45 U. S. C. §152 First; emphasis added). Here, during the original negotiations, the parties did "exert every reasonable effort" to *make* an agreement: after extensive bargaining on the difficult subject of dues check-off, they were able to strike a compromise. An agreement reflecting that compromise having been made, the question presented by this case is whether the agreement, once made, can be *maintained*.

The agreement has been fully performed by the Company, but the Second Circuit declared the *quid pro quo*—termination on a fixed date—to be contrary to public policy. A bargaining compromise of the type in question is a useful device for settling serious disputes. A decision which restricts the ability of labor and management to resolve their problems peacefully, by utilizing such bargaining compromises, should be reviewed by this Court.

The importance of the Second Circuit's decision is obvious. On one hand, a statute which, in form, substance, and legislative history, testifies to the importance of making and maintaining agreements is confronted, on the other hand, by a decision saying that such an agreement, the end-product of collective bargaining, cannot be given effect—indeed, that it may be struck down by an exercise of injunctive power.

We contend (i) that it should require a very plain showing of legislative purpose to produce such a result, (ii)

that the statute does not contain a plain showing of such a purpose, and (iii) that the statute instead plainly shows a legislative purpose to *maintain* agreements, not to *maim* them.

The Second Circuit hypothesizes that its decision "artificially" extending the dues check-off will "stabilize relations" (App. 4c). One may wonder whether frustration of purpose ever "stabilizes relations". In any event, the hypothesis is one that should be declared by Congress, not by the courts, and we respectfully seek the opportunity, in this case of first impression, to demonstrate that Congress has not enacted that hypothesis into law.

III.

According to the Second Circuit, "The effect of §6 [of the Railway Labor Act] is to prolong agreements subject to its provisions regardless of what they say as to termination" (App. 3c). In so concluding, the court's opinion ignores Section 2 Seventh (45 U. S. C. §152 Seventh). Section 2 Seventh permits carriers to make changes in working conditions as "embodied" in agreements in one of two ways: "in the manner prescribed" *either* "in such agreements *or* in Section 6 of this Act." (Emphasis added.)

In other words, if the agreement itself calls for a change to be made, as here, Section 2 Seventh permits the carrier to act accordingly; if not, the Section 6 procedures are applicable.

A clearer case for the applicability of Section 2 Seventh, and the non-applicability of Section 6, could scarcely be found. Of two duration clauses in two agreements entered into by the parties on the same date, and prepared by the same draftsmen, one specifically refers to Section 6 and

its procedures, the other pointedly avoids doing so (both are quoted *supra*, pp. 4-5).

Based on Section 2 Seventh, the Supreme Court, in *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561 at 565 (1946), concluded that ". . . the *only* conduct which would violate §6 is a change of those working conditions which are 'embodied' in agreements." (Emphasis added.)*

In this case, the date for stopping the dues check-off is a part of the bargained for consideration that is "embodied" in the agreement just as much as any of its other terms and conditions. We therefore suggest that termination of the dues check-off was not in violation of Section 6, but was a change permitted under Section 2 Seventh, and that the Second Circuit's decision to the contrary is inconsistent, in principle, with *Order of Railway Conductors* v. *Pitney*, *supra*.

IV.

Directly affected by this case will be numerous fixed-term agreements between air carriers and their employees, and railroad contracts no doubt will be affected also. The *amicus curiae* brief submitted below by the Air Transport Association, on behalf of forty-three U. S. flag carriers, points out that the use of such "side agreements" with

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* The National Mediation Board, which performs mediatory functions pursuant to the Railway Labor Act, also takes the same view, as shown in its Twenty-ninth Annual Report, p. 32 (1963):

> ". . . the rights of the parties which they had prior to serving the notice of intention to change remain the same during the period the proposal is under consideration, and remain so until the proposal is finally acted upon. The Board has stated in instances of this kind that the serving of a section 6 notice for a new rule or a change in an existing rule does not operate as a bar to carrier actions which are taken under rules currently in effect."

fixed duration dates is commonplace in the air transport industry. "In the main, these side agreements and understandings refer to changes and variations in aircraft or route operations, unusual seniority or training requirements, new types of flight or ground equipment, short-term operations, emergencies and the like" (R. 149b, Br. p. 5). In the view of the Air Transport Association, the result below ". . . will have a harmful effect on the established industry practice of negotiating fixed term agreements to govern special circumstances" (Br. p. 6).

The subject matter of this case is also of substantial importance. Union security agreements are the subject of specialized statutory treatment in both the National Labor Relations Act and the Railway Labor Act. The importance of questions arising under these statutory provisions has caused this Court to grant certiorari to review cases arising under them in the past. See, *e.g.*, *Felter* v. *Southern Pacific Co.*, 359 U. S. 326 (1959).

V.

Also involved are Norris-LaGuardia Act problems sufficiently serious to warrant this Court's attention. Section 7 of the Act specifies that federal courts are *without jurisdiction* to issue injunctions in labor disputes unless they find, *inter alia*, that irreparable injury "will" follow and that there is no adequate remedy at law (29 U. S. C. §107). Under prior decisions such findings could not be made in this case, we think, because (i) the subject matter involves a claim for money and (ii) there had been no prior resort to the Adjustment Board. Cf. *Whitehouse* v. *Illinois Central Ry.*, 349 U. S. 366 at 373 (1955); *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561 at 567 (1946).

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York,
May 12, 1964.

Respectfully submitted,

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APPENDIX.

Opinion.

(991) UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 177—September Term, 1963.

(Argued October 22, 1963 Decided February 14, 1964.)

Docket No. 28461

JOSEPH V. MANNING, as President of the American Airlines Chapter, Flight Engineers' International Ass'n, *et al.*,

Plaintiffs-Appellees,

v.

AMERICAN AIRLINES, INC.

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*

MEDINA and FRIENDLY, *Circuit Judges.*

Appeal by an airline from an order of the District Court for the Southern District of New York, Inzer B. Wyatt, *Judge*, directing it to resume check-off of union dues. Affirmed.

ARTHUR M. WISEHART, New York, N. Y. (George A. Spater, H. Wayne Wile, of Counsel), *for American Airlines, Inc., Defendant-Appellant.*

Opinion.

(992) ASHER W. SCHWARTZ (O'Donnell & Schwartz, New York, N. Y.) (Walter N. Kaufman, of Counsel), *for Plaintiffs-Appellees.*

JOHN E. STEPHEN, Washington, D. C., submitted a brief for Air Transport Association of America as *amicus curiae.*

FRIENDLY, *Circuit Judge:*

This appeal concerns another phase of the controversy between American Airlines, Inc. and its flight engineers discussed in the opinions in No. 28473, this day decided. At the same time that it signed the basic agreement of May 1, 1958, with its Chapter of Flight Engineers' International Association, which was to "continue in full force and effect until April 30, 1963 and shall renew itself without change until each successive April 30 thereafter unless written notice of intended change is served in accordance with Section 6, Title I, of the Railway Labor Act, as amended, by either party hereto at least sixty (60) days prior to April 30 in any year after April 30, 1962," American executed another agreement for the check-off of union dues of engineers who signed a prescribed authorization form. This check-off agreement was to "continue in full force and effect until April 30, 1963, and shall be subject to renewal thereafter only by mutual agreement of the parties hereto." American's February 28, 1963 "opener" under the basic agreement excluded "the dues-checkoff agreement which expires of its own terms on April 30, 1963." Although the Chapter's February 28 "opener" did not refer to the check-off agreement, the Chapter gave notice on March 8 of a desire to change the latter so that it would have a termination date and a self-renewal clause similar to the proposed new basic agreement. American discontinued the check-off (993) of dues on May 1, 1963. In an action brought by the Chapter, Judge Wyatt issued an order directing it to resume this, from which it appeals.

Opinion.

Validity of the order turns primarily on §6 of the Railway Labor Act, 45 U. S. C. §156. The first sentence of that section requires 30 days' written notice of "an intended change in agreements affecting rates of pay, rules, or working conditions." The second sentence says that where such notice has been given, and in certain other instances not here material, "rates of pay, rules, or working conditions shall not be altered by the carrier" until the controversy has been finally acted upon by the Mediation Board or until a lapse of ten days after conferences without request for or proffer of its services—events which have not here occurred.

The propriety of an injunction to enforce the then unique provisions of the Railway Labor Act for maintaining the *status quo* while the parties to a labor dispute pursue various stages of negotiation, mediation or arbitration, was established long ago. *Texas & N. O. R.R.* v. *Brotherhood of Ry. Clerks*, 281 U. S. 548, 565-66(1930). Although the *Texas & N. O.* decision antedated the Norris-LaGuardia Act, 29 U. S. C. §§101-115, the debates on that Act, 75 Cong. Rec. 5503-04 (1932), made clear that it was not intended to apply to injunctions of this nature. See *Railroad Yardmasters* v. *Pennsylvania R.R.*, 224 F. 2d 226 (3 Cir. 1955); *Chicago, R. I. & P. R.R.* v. *Switchmen's Union*, 292 F. 2d 61, 63-64, 66 (2 Cir. 1961), cert. denied, 370 U. S. 936 (1962).

American's principal argument, in which it is joined by the Air Transport Association of America as *amicus curiae*, is that §6 is inapplicable because the check-off is a "specialized" agreement with a fixed termination date and without the self-renewal provisions of the basic agree-
(994) ment. Stated so broadly the argument is wholly without force. The effect of §6 is to prolong agreements subject to its provisions regardless of what they say as to termination. If the basic agreement of 1958 had no automatic renewal clause, §6 would have nonetheless applied; unless the terms of the agreement were still to be followed

there would be "an intended change," which would bring into play the thirty-day notice provision of §6 and with it the requirement of the second sentence that the *status quo* be maintained until compliance with all the demands of the section was had. Indeed, the current effectiveness of the wage and hour clauses of the basic agreement, which American does not contest, is due solely to the second sentence of §6, since automatic renewal was prevented by the openers.

A stronger form of the argument is that the contrast of the language of the check-off agreement—"shall be subject to renewal thereafter only by mutual agreement of the parties hereto"—with the automatic renewal language of the basic agreement, and of two side agreements, warrants the conclusion that the parties did not mean §6 to apply. Passing the question whether and how parties subject to the Railway Labor Act can lawfully make agreements "affecting rates of pay, rules or working conditions" so that these will not be subject to §6, as might be convenient when unusual situations of short duration arise within the period of a basic contract, we think the argument puts more strain on the words of the check-off agreement than these will bear. In our view the different language meant only that automatic renewal of the basic agreement would not carry the check-off agreement along with it. It is no answer that §6 thus gives identical effect to two intentionally dissimilar provisions; the very purpose of §6 is to stabilize relations by artificially extending the lives of (995) agreements for a limited period regardless of the parties' intentions.

American was thus required to maintain the check-off if, but only if, this comes within the phrase "rates of pay, rules or working conditions"—a phrase in §6 which springs from the original Railway Labor Act of 1926, 44 Stat. 582, and was left unchanged when the Act was amended in 1934, 48 Stat. 1197. We see little force in American's claim that Congress could not have intended a check-off agree-

ment to be comprehended by these words since §2 Fourth of the Railway Labor Act made all such agreements unlawful until §2 Eleventh was added in 1951, 64 Stat. 1238. A statute taxing "beverages," enacted during the prohibition era, would surely include hard drinks when these became lawful, as well as soft ones. But the question remains whether an agreement which, as American argues, affects only the employees' relations with their union, as distinguished from matters such as hours, seniority or safety, is a "working condition."

We are persuaded that it is. "Working conditions" is a broad term. The Act uses the same phrase "rates of pay, rules, or working conditions" in §§3 First (i) and 204, 45 U. S. C. §§153 First (i) and 184, relating to boards of adjustment, where the desire was rather plainly to be as comprehensive as possible; we find it difficult to believe that if during the term of the agreement the Chapter had complained of an inadequacy in the check-off and had refused to submit the issue to a board of adjustment, American would not have thought itself entitled to the powerful remedy which the Act gives when a union declines to arbitrate such a dispute. See *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R.R.*, 353 U. S. 30 (1937). The check-off has been held to come within the provisions of the National Labor Relations Act, §§8(a)(5) and 9(a), (996) requiring an employer to bargain with the employees' designated representative "in respect to rates of pay, wages, hours of employment, or other conditions of employment." *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 136 (1 Cir.), cert. denied, 346 U. S. 887 (1953); cf. *Switchmen's Union* v. *Southern Pac. Co.*, 253 F. 2d 81, 84 (9 Cir.), cert. denied, 358 U. S. 818 (1958). The purpose of §6 was to prevent rocking of the boat by either side until the procedures of the Railway Labor Act were exhausted; interpreting "working conditions" to include an agreed check-off accomplishes that purpose better than a narrower construction.

Opinion.

American's claim that the controversy was within the exclusive jurisdiction of the board of adjustment under §204 overlooks that what is here involved is not "the interpretation or application" of the check-off agreement, which admittedly expired on April 30, 1963, but the application of §6 of the Railway Labor Act. The many other arguments advanced do not warrant discussion.

Affirmed.

(163B) UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of February one thousand nine hundred and sixty-four.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HAROLD R. MEDINA,
HON. HENRY J. FRIENDLY,
Circuit Judges.

JOSEPH V. MANNING, as President of the AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Plaintiffs-Appellees,

v.

AMERICAN AIRLINES, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Order of the District Court Affirmed by the U. S. Court of Appeals for the Second Circuit.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk.

Order of the District Court Affirmed by the U. S. Court of Appeals for the Second Circuit.

(469) Plaintiffs' motion for a preliminary injunction in their favor and against the defendant having come on for hearing, and the Court having considered the pleadings, the affidavits submitted in support of said motion and in opposition thereto, the evidence introduced in open court, and the memoranda of law submitted by the parties, and the Court having separately made and filed findings of fact and conclusions of law, it is

Ordered that until (a) the final hearing and judgment herein or (b) the controversy has been finally acted upon as required by Section 5 of the Railway Labor Act (45 U. S. C. §155), by National Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board, whichever first occurs, defendant, American Airlines, Inc., its officers, agents and employees, be and hereby are enjoined and restrained from discontinuing the deduction of dues and the remittance thereof to the American Airlines (470) Chapter, Flight Engineers' International Association, AFL-CIO, in accordance with the practice established and followed under the dues check-off agreement entered into by American Airlines, Inc., and

said Chapter, which agreement expired April 30, 1963; and it is further

ORDERED that defendant American Airlines, Inc., shall deduct and remit to the American Airlines Chapter, Flight Engineers' International Association, AFL-CIO, dues payments in the amount which was to be deducted and remitted between May 1, 1963, and the date of this Order; and it is further

ORDERED that until (a) the final hearing and judgment herein or (b) the controversy has been finally acted upon as required by Section 5 of the Railway Labor Act (45 U. S. C. §155), by National Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board, whichever first occurs, defendant American Airlines, Inc. shall continue the deduction and remittance of dues in accordance with said dues check-off agreement; and it is further

ORDERED that defendant American Airlines, Inc., by and through its duly authorized officers, agents, and employees, shall treat with the American Airlines Chapter, Flight Engineers' International Association, AFL-CIO, and exert every reasonable effort to settle any controversy or dispute with said Chapter concerning the check-off of dues and whether there should, or should not, be an agreement therefor between the parties; and it is further

(471) ORDERED that under Fed. R. Civ. P. 65(c) plaintiffs are to give security in the form of a bond, with corporate surety, to be approved by the Court in the sum of two hundred and fifty dollars ($250) conditioned for the payment of such costs and damages as may be incurred or suffered by any party found to have been wrongfully enjoined or restrained.

Dated: New York, New York
September 16, 1963

INZER B. WYATT
United States District Judge

Statutory Provisions.

Railway Labor Act, Section 201 (49 Stat. 1189, 45 U. S. C. §181):

> "All of the provisions of Sections 151, 152, and 154-163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service."

Railway Labor Act, Section 2 (44 Stat. 577, 48 Stat. 1186, 62 Stat. 909, 64 Stat. 1238, 45 U. S. C. §152):

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."
>
> . . . . . .
>
> "Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its

employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

* * * * * * *

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

* * * * * * *

"Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or

refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

"Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees

to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations,

national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended."

Railway Labor Act, Section 6 (44 Stat. 582, 48 Stat. 1197, 45 U. S. C. §156):

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the

representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Railway Labor Act, Section 204 (49 Stat. 1189, 45 U. S. C. §184):

"The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives,

selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jursdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in sections 151-163 and 181-188 of this title shall prevent said car ers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of sections 181-188 of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction."

Norris-LaGuardia Act, Section 7 (47 Stat. 71, 29 U. S. C. §107):

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order

shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued

except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined or any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity."

Norris-LaGuardia Act, Section 8 (47 Stat. 72, 29 U. S. C. §108):

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 79

AMERICAN AIRLINES, INC.,

Petitioner,

v.

JOSEPH V. MANNING, as President of AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' MEMORANDUM IN OPPOSITION

ASHER W. SCHWARTZ,
501 Fifth Avenue,
New York, New York 10017,
Attorney for Respondents.

WALTER N. KAUFMAN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1105

AMERICAN AIRLINES, INC.,

Petitioner,

v.

JOSEPH V. MANNING, as President of AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' MEMORANDUM IN OPPOSITION

This case is not the kind for review by this Court. The reasons Petitioner has advanced for granting the writ are plainly insubstantial. Respondents, therefore, state their opposition in memorandum form.

1.

This case was the second of two in which Respondents ("the Chapter") sought and obtained injunctive relief against Petitioner ("the Company"). In the first—a suit commenced by the Air Line Pilots Association ("ALPA")

for recognition as the pilots' bargaining representative—the Chapter, as intervenor, sought to compel the Company to bargain with it as the flight engineers' representative, initially with respect to the rates of pay, rules and working conditions covered by the parties' basic agreement. Soon thereafter, in this case, which was referred to the same District Judge, the Chapter sought the same relief with respect to the parties' separate check-off agreement; and since the Company had threatened to discontinue (and later discontinued) the check-off, despite the Chapter's having served a notice pursuant to Section 6 (45 U. S. C. §156) (App. 13c-14c*), the Chapter also sought injunctive relief against such discontinuance.

The District Court granted the Chapter's motion for preliminary injunction in the former case, but denied ALPA's motion, holding there was a substantial question as to the identity of the pilots' true representative—a question which the National Mediation Board had exclusive jurisdiction to determine. On ALPA's appeal, the Second Circuit affirmed, and this Court denied ALPA's petition for certiorari. *Ruby* v. *American Airlines, Inc.*, 227 F. Supp. 674 (S. D. N. Y.), *aff'd*, 323 F. 2d 248 (2d Cir. 1963), *cert. denied*, 376 U. S. 913 (1964).**

If there was no compelling reason to review the jurisdictional determination in the *Ruby* case, there would appear to be no compelling reason to review the jurisdictional de-

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* References to the Appendix to the Petition and to the Record Appendix are made in the manner used in the Petition (Pet. 2n).

** On the Company's separate appeal, which was consolidated for oral argument with its appeal in this case, the Second Circuit affirmed. *Ruby* v. *American Airlines, Inc.*, 329 F. 2d 11 (2d Cir. 1964). The petition for a rehearing *en banc* was denied on April 10, 1964.

termination by the same Court in this case—the principal reason the Company advances for granting the writ.

2.

The Company contends that the Second Circuit's jurisdictional decision—that the Adjustment Board did not have exclusive juridiction—is in "direct" conflict with decisions in other Circuits and in this Court (Pet. 7). The contention is grossly misconceived. There is neither a direct conflict, nor a conflict in principle. For in *every* case the Company cites to support its contention, there was an *existing* agreement (or, in one instance, a dispute as to whether or not the agreement terminated). However, in this case, it is undisputed that the agreement terminated (Pet. 5). It follows, there is no agreement for the Adjustment Board to interpret or apply.

In other words, this case clearly presents a "major" dispute: the agreement has expired; the Chapter wants to negotiate a new one; the Chapter, therefore, served a Section 6 notice.*

The interpretation issue which the Company raises (Pet. 7-8), is specious, not to say spurious, for the Chapter does not contend that it is the expired check-off agreement which requires the Company to continue checking-off. Rather, the Chapter contends that Section 6 so requires—that as a matter of law, not contract, the Company must maintain the status quo until the statutory settlement procedures, initiated by the Section 6 notice, are exhausted.

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* The distinction between "major" and "minor" disputes was first spelled out in *Elgin, J. & E. Ry.* v. *Burley*, 325 U. S. 711, 723 (1945).

It is true that the Court of Appeals, like the District Court, did not think the parties had intended by their check-off agreement to take themselves out from under the status-quo requirements of the Railway Labor Act. The Company continues to contend the parties did so intend.* But what the Court of Appeals, like the District Court, *held* was that, "regardless of the parties' intentions," they remain subject to Section 6 (App. 4c; R. 17a-18a).

3.

If the issue on the merits is one "of first impression" (Pet. 11), it is not troublesome. It did not trouble the District Court or the Court of Appeals, and there is no reason to suppose it will trouble other courts.

Neither of the Courts below had difficulty deciding that an agreement to dispense with the status-quo provisions of Section 6, if valid, would be at variance with the dispute-settlement scheme of the Railway Labor Act and would thus contribute more to instability than stability in labor relations (App. 4c; R. 17a-18a). For the logical consequence of the Company's contention is that hereafter any union, as well as any carrier, for whatever reasons it finds adequate or appealing, could wield its bargaining power to negotiate a like agreement and thereby rid itself of the restraints long required by the Railway Labor Act in the interest of industrial peace in interstate transportation:

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* The allegations in the third paragraph of the Company's statement of the case (Pet. 4) are not among the District Court's findings of fact, but constitute an argument only. For a statement of the case, this Court is respectfully referred to the opinions of the Court of Appeals and the District Court (App. 2c; R. 8a-9a).

> . . . The purpose of §6 was to prevent rocking of the boat by either side until the procedures of the Railway Labor Act were exhausted. . . . (App. 5c)
>
> . . . In this instance, if defendant [Company] were now free to use the self-help of stopping the dues check-off, the union would seem equally free to strike over the issue. Congress meant a negotiating, cooling and mediating period to intervene before such confrontations. (R. 16a)

The disastrous consequence of the Company's contention probably goes far to explain why the issue is one of first impression.

4.

This Court should not be called on to construe private agreements. Yet, the Company invites comparison between the duration clauses in the basic and check-off agreements (Pet. 13-14) and, citing Section 2 Seventh (45 U. S. C. §152 Seventh) (App. 10c), contends that the expiration date of the *check-off* agreement is a "working condition" which is "embodied" therein, so that the Company could discontinue the check-off on the agreed expiration date without regard for Section 6.

Obviously, however, there is "embodied" even in the basic agreement an expiration date, to take effect on the service of a Section 6 notice. The parties exchanged Section 6 notices affecting the basic agreement. Thus, *both* the basic and check-off agreements have now expired, *as provided for in their respective duration clauses.* The Company agrees it must maintain the working conditions covered by the basic agreement (App. 4c), but contends that it need not continue the check-off because expiration was "embodied" only in the check-off agreement!

Furthermore, the contention that Section 2 Seventh provides for an absolute alternative to Section 6 is also specious. Rather, Section 2 Seventh does no more than permit the parties to agree that the carrier may make given changes under given circumstances *during the life of the agreement*. That Section hardly relieves the carrier of an obligation fundamental to the statutory scheme from its original enactment—to maintain the status quo when Section 6 notices are served with a view toward negotiating changes to take effect *upon expiration of the agreement.**

5.

There is no substance whatever in the Company's contention that the "numerous fixed-term" or "side" agreements between air carriers and their employees—agreements which, in the language of the Second Circuit, cover "unusual situations of short duration" (App. 4c)—are "directly affected" by the decision below (Pet. 14). Such apparently are the very agreements which Section 2 Seventh contemplates. In any event, the Second Circuit expressly left the question open (App. 4c), since the question was not before the Court.

It is altogether apparent from the examples set forth in the Petition (Pet. 15) that the subject of check-off is hardly a "special circumstance," but, rather, like wages, a man-

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* Section 2 Seventh, in its present form, was enacted with the 1934 amendments, which introduced "no new principle into the existing law at all. There is nothing new introduced so far as elementary principles are concerned, into the existing law." H. R. Rep. No. 9861, 73d Cong., 2d Sess. 10 (1934). The agency which administers the Act agrees. NMB, *Administration of the Railway Labor Act by the National Mediation Board, 1934-1957* 85-86 (1958).

datory subject of collective bargaining in agreement after agreement. The parties could as well have printed the wage sections of the basic agreement as a separate or "side" agreement on wages, with a separate duration clause like the one in the separate check-off agreement. Would the Company, in the face of a Section 6 notice, have then been free to change wages upon the expiration of such a "side" agreement?

For the foregoing reasons, it is respectfully submitted that the petition should be denied.

Dated: New York, New York,
June 10, 1964.

Respectfully submitted,

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WALTER N. KAUFMAN,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 79.

AMERICAN AIRLINES, INC.,

Petitioner,

v.

JOSEPH V. MANNING, as President of the AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Respondents.

REPLY BRIEF FOR PETITIONER.

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Of Counsel

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REPLY BRIEF FOR PETITIONER.

Two arguments in respondents' memorandum in opposition to certiorari require a reply:

1. Respondents' memorandum creates the impression that denial of certiorari in another case is virtually dispositive of the petition for certiorari here (Br. 2-3):

> "If there was no compelling reason to review the jurisdictional determination in the *Ruby* case, there would appear to be no compelling reason to review the jurisdictional determination by the same Court in this case—the principal reason the Company advances for granting the writ."

As shown more fully below, respondents' discussion of the *Ruby* case is misleading in two respects:

(a) if anything, the denial of certiorari in the *Ruby* case would *support* the granting of certiorari here rather than its denial; and

(b) respondents were not even parties in the appeal relied on, contrary to the impression given, but the separate appeal in which they *are* parties is the subject of independent petitions for certiorari which are currently pending.

• • • • • •

(a) The case relied upon by respondents—*Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248 (2 Cir. 1963), certiorari denied, 376 U. S. 913—upholds the exclusive jurisdiction of an agency created by Congress to decide a labor dispute. Exclusive jurisdiction of such an agency is also the rule which we believe to govern this case. *Ruby* holds that the National Mediation Board has exclusive jurisdiction over questions of representation; here, we contend that the Adjustment Board has exclusive jurisdiction over disputes involving the administration of labor agreements. Thus, if denial of certiorari indicates satisfaction with the result reached by a lower court, as respondents assume, the denial of certiorari in the case on which they rely would be a factor leading to the *granting* of certiorari here.

(b) One can read respondents' entire discussion of the *Ruby* case without being informed that respondents were not even parties to the appeal, but were severed out, *sua sponte*, by the District Court. *Ruby* v. *American Airlines, Inc.*, 227 F. Supp. 702 at 704 (S. D. N. Y. 1963). The appeal relied on by respondents therefore involved no aspect whatever of the litigation between petitioner and respondents, as the Court of Appeals was careful to point out (323 F. 2d. at 249, fn. 1):

"Judge Wyatt's opinion also dealt with a related dispute between American and . . . [respondents]. This is not before us, and *we intimate no views in its regard.*" (Emphasis added.)

The case in which respondents are parties was decided by a different panel of judges in the Court of Appeals (329 F. 2d 11), and is now before this Court in the form of two independent petitions for certiorari: *O'Connell* v. *Manning*, No. 454, and *American Airlines, Inc.* v. *Manning*, No. 455.

Respondents' opening comment is that their opposition is in "memorandum form" because our reasons for seeking certiorari are "plainly insubstantial" (Br. 1). We submit that this is hardly an excuse for not telling the whole story—which, when told, shows respondents' chief argument to be entirely without merit.

2. Nor is the whole story told in respondents' statement that "... it is undisputed that the [dues check-off] agreement terminated (Pet. 5)." (Br. 3) What "Pet. 5" *says* is that "the parties intended that the dues check-off would end on April 30, 1963. . . ." Thus, as we interpret the dues check-off agreement, it contains an affirmative undertaking by the two parties that the dues check-off would end on a date certain, not simply that the contract itself would expire. This interpretation is based on the language of the duration clause, the negotiating history of the agreement, the interpretation and application of contemporaneous documents, and past practice in the Company and the industry—all of which we believe to be properly matters for the specialized determination of the Adjustment Board with a prominent labor arbitrator sitting as neutral. As this Court recently remarked in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 at 555 (1964), upholding arbitrability of questions arising under an expired agreement,

> "We see no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired."

Further, the duty to arbitrate here arises not under the dues check-off agreement at all, but by virtue of the parties' commitments in two separate agreements—the System Board of Adjustment agreement and the basic working agreement—which contain the grievance and Adjustment Board procedure. Respondents do not deny that these separate agreements *have* remained in effect. Under them, the System Board of Adjustment is a duly authorized, currently functioning body, with jurisdiction over this dispute.

Conclusion.

The petition for certiorari should be granted.

Dated: New York, New York
September 24, 1964

Respectfully submitted,

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